No. 10-627

JUN 6 - 2011

IN THE

Supreme Court of the United States

THE CITY OF NEW YORK,

Petitioner,

-against-

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS and THE BAYARYN JARGALSAIKHAN, *as principal resident representative* to the United Nations of the Mongolian People's Republic,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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ARGUMENT

Introduction

This case involves an extraordinary assertion of preemptive authority by a federal agency. Acting on the basis of broad, non-specific language in the FMA, the Secretary has prohibited Petitioner from applying its general property tax laws to foreign mission and consular staff housing. Further intruding on local taxing powers, the Secretary imposed the ban retroactively, thereby wiping out Petitioner's nearly $50 million judgment against Respondents, and over $200 million in tax liens and interest. Notably, in his invitation brief, the Solicitor General fails to cite any case upholding agency preemption (let alone retroactive preemption) of a general state or local tax law.

This Court should grant review to resolve the far-reaching federalism issue presented here: whether federal agencies have the power to preempt traditional state taxing powers absent clear (and, with respect to retroactive preemption, explicit) congressional authorization.

A. Federal Agency Preemption of State and Local Tax Laws is an Extraordinary Intrusion on State Sovereignty.

State taxing authority is "central to state sovereignty." *Department of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 344-45 (1994). Congress respects this principle, and related federalism principles, by preempting state and local tax laws only rarely, and *property* tax laws even less frequently.

This Court never assumes a casual exercise of Congress's "extraordinary power" to interfere with the States' "substantial sovereign powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). Thus, Congress must express its intent to preempt state and local property tax laws in clear, unmistakable terms. *See, e.g.*, 49 U.S.C. § 11501(b)(3) (forbidding excessive rates of state and local "property tax[es] on rail transportation property"). In *ACF*, for example, this Court reasoned that if Congress had intended to restrict state power to provide certain property tax exemptions, it "would have spoken with clarity and precision." 510 U.S. at 344.

Accordingly, one would expect Congress to be extremely cautious about granting federal agencies the "extraordinary power" to preempt state and local property tax laws. *Gregory*, 501 U.S. at 460. Indeed, the Solicitor General provides no examples of federal statutes granting federal agencies broad discretion to eradicate state or local tax laws.

If Congress had intended to depart from usual practice, and grant the Secretary power to preempt state and local property tax laws on behalf of foreign missions, Congress would have expressed that intent clearly. *See Gonzales v. Oregon*, 546 U.S. 243, 274 (2006); *Solid Waste Agency v. United States Army Corps of Eng.*, 531 U.S. 159, 172-73 (2001). The FMA contains no such expression of congressional intent.

B. The FMA does not Grant the Secretary Clear Authority to Preempt State and Local Tax Laws.

Citing *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982), the Solicitor General argues that a statute merely granting a federal agency broad power may authorize agency preemption of state and local tax laws (SG Br. at 9-17). In *De la Cuesta*, however, this Court upheld a preemptive regulation of the Federal Home Loan Bank Board (the "Board") based upon statutory language "plainly indicat[ing]" that "existing state law" would not bind the Board's regulation of federal savings and loans. 458 U.S. at 161-62.[1]

The Solicitor General gives no weight either to the profound federalism implications of his position, or to the importance of taxing powers to the existence, independence and operation of the States (Pet. at 7, 19-21). While Petitioner does not dispute that valid federal laws preempt conflicting state law, regardless of the "relative importance to the State of its own law" (SG Br. at 13-14), that observation is off point here. The question before this Court is whether Congress authorized the Secretary to preempt state and local property tax laws, notwithstanding Congress's historical reluctance to interfere with vital state powers.

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1. This Court held that a Board regulation permitting federal savings and loans to use certain clauses in mortgage contracts preempted contrary California case law. Agreeing with the majority, Justice O'Connor wrote separately to emphasize that nothing in the relevant statute "remotely suggests that Congress intended to permit the Board to displace local laws, such as tax statutes . . . not directly related to savings and loan practices." 458 U.S. at 171-72 (O'Connor, J., concurring).

Far from expressly authorizing the preemption of state and local property tax laws, the FMA does not even mention taxes, and its legislative history makes clear that Congress did not intend to authorize their preemption. As a result, the Solicitor General must try to infer a grant of tax-preemptive powers. That effort is unpersuasive.

1. The FMA's "benefits" provisions do not authorize the Secretary to preempt state and local tax laws.

The FMA's "benefits" provisions, sections 4302(a)(1), 4303(2), and 4304 (a-b), together with its preemption provision, section 4307, achieve Congress's goals by granting the Secretary effective regulatory control over foreign missions' access to otherwise available real property, goods, and services (Pet. at 26-33). Despite admitting that Congress's "primary focus was on reciprocal sanctions," the Solicitor General incorrectly argues that the FMA "benefits" provisions authorize the Secretary to "designate" state and local law property tax exemptions as "benefits" for conferral upon foreign missions (SG Br. at 9-12).

The Solicitor General's expansive interpretation of the FMA has no apparent limit. In his view, the Secretary seemingly enjoys unlimited power to "designate" anything she wishes as a "benefit" for conferral upon foreign missions. Thus, to improve relations with a foreign government, the Secretary presumably could order states and localities to refund property taxes previously paid. Aside from being an implausible view of the statute, the Solicitor General's open-ended reading ignores this Court's rule that foreign affairs statutes do not "grant the Executive totally unrestricted freedom of choice." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

Moreover, the Solicitor General's broad reading of the term "benefit" is inconsistent with the thrust of FMA section 4302(a)(1). *See generally Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003). It would have made no sense for Congress to have listed various "benefits" of relative inconsequence, and nevertheless to have intended, by a broad supplemental phrase, to sweep in an extraordinary "benefit" like immunity from state and local taxes. More sensibly read, the FMA allows the Secretary only to designate, as benefits, the acquisition of items somehow proportionate to the real property, goods, and services enumerated in section 4302(a)(1) (Pet. at 30).

Misconstruing FMA section 4304, the Solicitor General further asserts that the Secretary may provide preemptive "benefits" in order to "advance certain enumerated foreign relations goals," such as the resolution of disputes between the United States and a foreign government (SG Br. at 2, 10, 15, 17, 20, 22). This assertion elides the statutory distinction between providing requested "benefits" on specified terms and conditions (section 4304[a]), and restricting "benefits" based upon the criteria enumerated in section 4304(b).

Upon the request of a foreign mission, FMA section 4304(a) authorizes the Secretary to provide "benefits" to foreign missions, such as customs and importation services (see Pet. at 29), upon specified terms and conditions. Section 4304(b) authorizes the Secretary "to impose substantive and procedural *constraints* on the basis of reciprocity or otherwise, in accordance with" enumerated criteria, including the need to resolve a dispute. Senate Rep. No. 97-329 at 9 (emphasis added); *see also* House Rep.

No. 97-102, Pt. 1, at 32 (same). Nothing in section 4304 authorizes the Secretary to provide – let alone create and confer – benefits in order to resolve disputes with foreign governments.

The Solicitor General's expansive interpretation of the FMA "benefits" provisions is also inconsistent with his own interpretation of the FMA preemption provision, section 4307. The Solicitor General concedes that under section 4307, the Secretary may only encroach upon local police power by *denying* benefits (SG Br. at 14). But if Congress had intended to authorize the Secretary to exempt foreign missions from state and local laws, Congress would not have explicitly protected such a large body of state and local laws from affirmative preemption.

Finally, the Solicitor General misconstrues FMA section 4301(c), which directs the Secretary to determine the "treatment" accorded to a foreign mission after "due consideration" of (1) "the benefits, privileges, and immunities provided" to United States missions in the relevant foreign country; and (2) the protection of United States interests. Rather than authorizing the Secretary to create state and local law exemptions (SG Br. at 1-2, 9-13, 15, 17), section 4301(c) is merely a policy statement making reciprocity "a key feature of the system" the FMA envisions. *See* Senate Rep. No. 97-283 at 5; House Rep. No. 97-102, Pt. 1, at 29.

2. **The FMA's preemption provision does not authorize the Secretary to preempt state and local tax laws.**

FMA section 4307 dovetails with the FMA's "benefits" provisions, and respects local autonomy, by authorizing the Secretary to preempt state and local police powers only negatively, *i.e*, by denying benefits (Pet. at 31-33). From the absence of any reference to state and local tax laws in section 4307, the Solicitor General attempts to infer that Congress granted the Secretary authority to preempt them (SG Br. at 14-15). The Solicitor General's argument ignores this Court's contrary precedent (Pet. at 31-33).

Moreover, the FMA legislative history supports Petitioner's interpretation of section 4307. The original House and Senate bills contained a broader preemption provision. Senate Rep. No. 97-329 at 32; House Rep. No. 97-102, Pt. 1, at 62. Disclaiming any intention to preempt "affirmatively," the State Department represented to Congress that it construed the original provision as having no effect on state and local law, except "that the Secretary . . . may disqualify a foreign government from obtaining or retaining official facilities." *See* Senate Rep. No. 97-329 at 5, 17.

Accordingly, Congress narrowed the preemption provision to its present form. *See* House Rep. No. 97-693 at 40. This "limited" preemption provision, the House/Senate Conference Report states, expresses "the preemptive effect" of the Secretary's right "to preclude the acquisition of any benefits by a foreign mission[,]" and renders the Secretary's denial of benefits "controlling." *Id.* at 43. "The principal impact" of section 4307 "is to preclude [a foreign

mission's] reliance on local law . . . in an effort to secure benefits contrary to limitations imposed by the Secretary." *Id.* Section 4307, the Conference Report confirms, "*does not otherwise affect State or local law or regulations . . .* ." *Id.* (emphasis added).

This legislative history refutes any reading of section 4307 as allowing the Secretary to create, and confer upon foreign missions, preemptive exemptions from state and local tax laws.

3. The FMA's foreign policy subject matter does not give the Secretary carte blanche to preempt state and local law.

To overcome the absence of "affirmative" preemptive authority in the FMA, the Solicitor General argues that because the FMA involves foreign affairs, Congress must have intended to grant the Secretary broad power to preempt state and local laws (SG Br. at 13-14, 20, 22). To the contrary, as noted above (at page 6), Congress explicitly limited the Secretary's preemptive authority in FMA section 4307.

The Solicitor General misplaces reliance upon *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), and *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (SG Br. at 13, 20). In *Garamendi*, this Court held that executive claims-settlement agreements preempted a California law requiring insurance companies to disclose information about Nazi-era European insurance policies. In *Crosby*, this Court held that a federal statute preempted a Massachusetts law barring state entities from buying goods or services

from companies doing business with Burma. Neither case suggests that foreign affairs statutes implicitly authorize the Secretary to preempt generally-applicable state and local laws – let alone state and local property tax laws allowed under the Vienna Conventions (App. 82a-85a). *Cf. Zschernig v. Miller*, 389 U.S. 429, 443 (1968) (Stewart, J., and Brennan, J., concurring) ("the basic allocation of power between the States and the Nation . . . cannot vary . . . with the shifting winds at the State Department").

C. Agency Power to Preempt State and Local Tax Law Retroactively Requires Express Congressional Authorization.

Beyond asserting the extraordinary power to preempt state and local tax laws, the Secretary claims the additional right, under the FMA, to do so retroactively. 74 Fed. Reg. 31,788. Because "the FMA does not contain . . . express authorization for the State Department to issue a [retroactive] rule" (App. 62a), this Court's precedent invalidates the retroactive portion of the Notice (Pet. at 38-40).

The Solicitor General fails to cite any case upholding a federal agency's retroactive preemption of state or local law without explicit congressional authorization (SG Br. at 21-22). There is no authority for the Solicitor General's assertion that because the Notice supposedly avoids impairing vested rights or upsetting settled expectations (which is, at any rate, incorrect, see Pet. at 7-8), the Secretary may promulgate retroactive rules under the FMA without express statutory authorization. Having rejected a similar argument in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 215 (1988), this Court should reject it again here.

* * *

Without any congressional consideration of the international, federal, and local interests at stake, the Secretary took the extraordinary step of proclaiming state and local property taxes preempted, both prospectively and retroactively. This Court should grant review to consider the legality of that highly intrusive agency action, and to clarify that federal agencies have only as much preemptive power as Congress clearly confers. By holding that even when foreign affairs are involved, ambiguous statutes cannot authorize agency preemption, this Court would shield vital state powers from federal agency overreach.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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